Tay Tian Liang v Hong Say Tee & Ors

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–545 OF 1993
ABDUL MALIK ISHAK J
21 FEBRUARY 1995

Companies and Corporations *— Corporate veil — Piercing the corporate veil — Interest of justice — Revealing existence of subsidiary*

Contract *— Indemnity — Sale and purchase agreement — Construction — Indemnity given by vendor for deletion or diminution of assets — Tax due and payable before date of agreement — Whether vendor liable to indemnify purchaser for the payment of such tax*

Evidence *— Admissibility — Sale and purchase agreement — Construction — Surrounding circumstances — Factual background — Contemporaneous or near contemporaneous evidence — Oral evidence — Relation to self-interested testimonies of parties*

Estoppel *— Assertion — Party precluded from alleging or proving a fact — Fact otherwise than made to appear — Exclusion of evidence of witness — Party seeking exclusion applied for attendance for cross-examination in the first place*

The plaintiff purchased on behalf of himself and his undisclosed nominees the entire shareholding of a company called Wato from the defendants. Wato at the material time of purchase owned the entire shareholding in a company called Hotel Wato Inn. The written agreement of sale and purchase contained terms obliging the defendants as vendors to indemnify the plaintiff as purchaser and Wato against any deletion or diminution in the value of the assets of Wato resulting from any claim for payment against Wato for tax payable prior to the date of the agreement under any legislation; and obliging the defendants as vendors to indemnify the plaintiff as purchaser and Wato against all actions, costs and demands in respect of debts and liabilities of Wato being discovered subsequent to the date of the written sale and purchase agreement.

The Inland Revenue Department then issued notices of assessment to Wato and Hotel Wato Inn requiring payment of RM112,951.20 in tax. The plaintiff complied with the tax demand and sought to be indemnified by the defendants of that amount. The defendants denied that the sale and purchase agreement contemplated the defendants to be responsible for the payment of taxes for both companies for the year of assessment at the material time. The defendants further prayed that the solicitor who prepared the written agreement for both parties be called as a witness in the event that the plaintiff wanted to deny the allegations made by the defendants. That solicitor made an affirmation which tended to support the plaintiff's case. The defendants applied to request the

attendance of this solicitor for cross-examination, which was granted. At the hearing of the originating summons, the solicitor gave evidence and was subject to cross-examination. Counsel for the defendants then submitted that the oral and affidavit evidence of the solicitor ought to be excluded as it contravened ss 91 and 92 of the Evidence Act 1950.

Held, allowing the plaintiff's application:

(1) The tax liabilities of both Wato and Hotel Wato Inn were contemplated by the parties. This was clearly demonstrated by the solicitor's act of retaining a sum of RM120,900 out of the balance purchase price as tax provisions for both companies in the year of assessment in question.

(2) The indemnity clauses of the written sale and purchase agreement must be construed to mean that it was incumbent upon the defendants to indemnify the plaintiff for income tax due and payable prior to the signing of the written agreement and which was incurred by the plaintiff; and in more general terms, that the liability of the defendants would incorporate both hidden and exposed liabilities, including the undisclosed debts of Wato and Hotel Wato Inn. Such undisclosed debts would also include the tax liabilities which had been settled by the plaintiff. The word 'company' when used in the written sale and purchase agreement embraced Hotel Wato Inn together with Wato.

(3) The contemporaneous or near contemporaneous oral evidence of the solicitor, particularly the background negotiations between the parties preceding the signing of the written agreement, contained matters which were relevant and germane and as such ought to be considered by the court in relation to the self-interested testimonies of the plaintiff and the defendants in their affidavit evidence.

(4) The defendants were estopped from saying that the oral testimony of the solicitor should not be accepted by the court as it tended to vary and add to the written agreement entered between the parties because it was the defendants who sought to cross-examine the solicitor in the first place. When a party to legal proceedings was precluded from alleging or proving that a fact was otherwise than it had been made to appear, an estoppel was said to exist.

(5) The oral testimony of the solicitor was clearly admissible as evidence of surrounding circumstances and factual background leading to a written agreement.

(6) The words 'income tax due and payable prior to the date of this agreement' must be construed to mean the tax incurred prior to the date of agreement and assessed to be due and payable according to the scheme of the Income Tax Act 1967.

(7) The corporate veil of Wato would be pierced to reveal the existence of Hotel Wato Inn as a subsidiary of Wato for the sole objective of achieving justice.

[Bahasa Malaysia summary

Plaintif telah membeli bagi pihaknya sendiri dan penerima namaannya yang tidak diumumkan keseluruhan pemegangan saham sebuah syarikat bernama Wato daripada defendan-defendan. Wato pada masa pembelian itu memiliki keseluruhan pemegangan saham sebuah syarikat bernama Hotal Wato Inn. Perjajian bertulis jual-beli mengandungi syarat-syarat yang mewajibkan defendan sebagai penjual untuk menanggung rugi plaintif sabagi pembeli dan Wato terhadap apa-apa pengurangan dalam nilai aset Wato yang berpunca daripada apa-apa tuntutan untuk bayaran terhadap Wato untuk cukai yang kena dibayar sebelum tarikh tarikh perjanjian itu di bawah apa-apa undang-undang; dan mewajibkan defendan sebagai penjual menangggung rugi plaintif sebagai pembeli dan Wato terhadap semua tindakan, kos dan tuntutan berkenaan dengan hutang dan tanggungan Wato yang dijumpai selepas tarikh perjanjian bertulis jual-beli itu.

Jabatan Hasil Dalam Negeri kemudiannya telah mengisukan notis taksiran kepada Wato dan Hotel Wato Inn mengkehendakkan bayaran RM112,951.20 sebagai cukai. Plaintif telah mematuhi tuntutan cukai itu dan memohon tanggung rugi daripada defendan untuk jumlah itu. Defendan menafikan bahawa perjanjian jual-beli itu memikirkan bahawa defendan bertanggung jawab untuk pembayaran cukai kedua-dua syarikat itu untuk tahun taksiran pada masa yang penting itu. Defendan selanjutnya memohon supaya peguamcara yang menyediakan perjanjian bertulis untuk kedua-dua pihak itu dipanggil sebagai seorang saksi jika plaintif ingin menafikan dakwaan yang dibuat oleh defendan. Peguamcara itu membuat satu pengesahan yang cenderung ke arah kes plaintif. Defendan selepas itu memohon kehadiran peguamcara itu untuk diperiksa balas dan permohonan itu telah dibenarkan. Di pendengaran saman pemula itu, peguamcara itu memberi keterangan dan diperiksa balas. Peguambela defendan kemudiannya berhujah bahawa keterangan lisan dan afidavit peguamcara itu harus diketepikan kerana ia melanggar ss 91 dan 92 Akta Keterangan 1950.

Diputuskan, membenarkan permohonan plaintif itu:

(1) Tanggungan cukai kedua-dua Wato dan Hotel Wato Inn memang difikirkan oleh pihak-pihak itu. Ini jelas ditunjukkan oleh tindakan peguamcara itu memegang balik sejumlah RM120,900 daripada baki harga belian sebagai peruntukan untuk cukai kedua-dua syarikat itu bagi tahun taksiran berkenaan.

(2) Fasal tanggung rugi di dalam perjanjian bertulis jual-beli itu mesti ditafsirkan untuk bermaksud bahawa adalah menjadi beban defendan untuk menanggung rugi plaintif bagi cukai pendapatan yang kena dibayar sebelum penandatanganan perjanjian bertulis itu dan yang telah dibayar oleh plaintif; dan secara lebih am, bahawa tangunggung defendan itu akan merangkumi kedua-dua tanggungan yang tersembunyi dan ketara, termasuk hutang Wato dan Hotel Wato Inn yang tidak diumumkan. Hutang yang tidak diumumkan juga akan meliputi tanggungan cukai yang telah diselesaikan oleh plaintif. Perkataan 'company' apabila digunakan di dalam perjanjian jual-beli itu merangkumi Hotel Wato Inn bersama dengan Wato.

(3) Keterangan lisan peguamcara itu yang semasa atau hampir semasa, terutama sekali rundingan latar belakang di antara pihak-pihak itu sebelum penandatanganan perjanjian bertulis itu, mengandungi perkara yang relevan dan oleh yang demikian patut dipertimbangkan oleh mahkamah berkenaan dengan keterangan plaintif dan defendan di dalam keterangan afidavit mereka yang memihak diri masing-masing.

(4) Defendan diestop daripada mengatakan bahawa keterangan lisan peguamcara itu tidak patut diterima oleh mahkamah memandangkan yang ia cenderung ke arah mengubah dan menambah kepada perjanjian bertulis yang diikat di antara pihak-pihak itu kerana adalah defendan sendiri yang pada mulanya memohon untuk memeriksa balas peguamcara itu. Apabila satu pihak kepada satu prosiding undang-undang dihalang daripada mengatakan atau membuktikan bahawa suatu fakta adalah selain daripada yang nampaknya telah dikemukakan, satu estopel dikatakan wujud.

(5) Keterangan lisan peguamcara itu jelasnya boleh diterima sebagai keterangan tentang keadaan sekeliling dan fakta latar belakang yang membawa kepada satu perjanjian bertulis.

(6) Perkataan-perketaan 'income tax due and payable prior to the date of this agreement' mesti ditafsirkan untuk membawa makna cukai yang telah ditanggung sebelum tarikh perjanjian itu dan ditaksirkan sebagai kena dibayar mengikut skim Akta Cukai Pendapatan 1967.

(7) Selindung korporat Wato akan dipecahkan untuk menunjukkan kewujudan Hotel Wato Inn sebagai sebuah anak syarikat Wato untuk tujuan tunggal mencapai keadilan.]

Notes

For cases on indemnity, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1814–1816; [1993] *Mallal's Digest* 491; [1994] *Mallal's Digest* 771; [1995] *Mallal's Digest* 566–567.

For cases on admissibility of oral evidence generally, see 7 *Mallal's*

A *Digest* (4th Ed, 1994 Reissue) paras 1184–1279.
For cases on estoppel, see 6 *Mallal's Digest* (4th Ed) paras 1454–1461.

Cases referred to

B *Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (folld)
Canadian & Dominions Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd [1947] AC 46 (folld)
Company, A, Re [1985] BCLC 333 (folld)
Keng Huat Film Co Sdn Bhd v Makanlall (Properties) Pte Ltd
C [1984] 1 MLJ 243 (folld)
The First National Bank of Chicago v Tan Lai Wah [1981] 2 MLJ 100 (folld)
Wallersteiner v Moir [1974] 1 WLR 991; [1974] 3 All ER 217 (folld)

D **Legislation referred to**

Evidence Act 1950 ss 91, 92
Income Tax Act 1967 s 103(1)
Rules of the High Court 1980 O 38 r 2(3)

E *Ho Thian Cheh (Ho Thian Cheh & Co)* for the plaintiff.
Gan Techiong (Gan & Lim) for the defendants.

Abdul Malik Ishak J: The plaintiff, a Singaporean, filed an originating summons (encl 3) against the defendants and sought for:

F (1) a declaration that on the true construction of the agreement dated 29 October 1991 and principally of cll 8(a) and 11 of the said agreement, the defendants are liable to pay for such portion of the income tax of Wato Enterprise Sdn Bhd and Hotel Wato Inn Sdn Bhd assessed by the Inland Revenue Department by notice of assessment (Borang J1) for year of assessment 1992, as is calculated or assessed up to 29
G October 1991;

And the following consequential reliefs, viz:

(2) that the defendants do forthwith indemnify the plaintiff the sum of RM93,455.51 (or such other sum as the court assesses) as being the amount of tax the defendants shall be responsible for up to 29
H October 1991;

(3) that the defendants do pay to the plaintiff the costs of and incidental to these proceedings to be taxed;

(4) that the plaintiff has liberty to apply;

(5) such further or other relief as the court considers just.

I The plaintiff duly affirmed an affidavit dated 22 July 1993 (encl 2) in support of his originating summons and he deposed the following salient facts.

That the plaintiff on behalf of himself and his undisclosed nominees purchased from the defendants the entire shareholding of Wato Enterprise Sdn Bhd ('Wato'). It seemed that at the time of purchase, both parties were aware that Wato owned the entire shareholding in Hotel Wato Inn Sdn Bhd ('Hotel') and that the sale and purchase of the entire shareholding in Wato necessarily include the entire shareholding of the Hotel. But this was not reflected in cl 9(h) of the written agreement entered between both parties where it was stated that: ' The company (referring to Wato) has no subsidiaries.' This omission was said to be an error that was inadvertently overlooked by both parties at the time of the execution of the written agreement. It was said that the written agreement contemplated the tax liabilities of both Wato and the Hotel as reflected in the Third Schedule where provisions for taxation as at 31 July 1991 were made for both companies under the headings 'deduct current liabilities'. It appeared that prior to the date of completion of the written agreement, a sum of RM120,900 was retained out of the balance purchase price by Messrs SK Song, the then solicitors acting for both parties, and such sums were tax provisions for both companies for the year of assessment 1992. It was said that currently the retention sum of RM120,900 was retained by Messrs Gan & Lim, the present solicitors for the defendants, pending adjudication by the court of the true import and meaning of cll 8(a) and 11 of the written agreement. Meanwhile, the Inland Revenue Department issued a notice of assessment vide form J(1) dated 20 September 1992 to Wato for tax payable in the year of assessment 1992 at RM14,641.52 (exh 'TLL2' in encl 2). A similar notice was issued to the Hotel dated 17 October 1992 for tax payable in the year of assessment 1992 at RM98,309.68 (exh 'TLL3' in encl 2). The law abiding plaintiff acted swiftly and paid, on instalments, the Inland Revenue Department for taxes payable for the year of assessment 1992 for Wato in the sum of RM20,966 (see the official receipts as exhibited in exhs 'TLL 4A to 'TLL 4E') and for the Hotel in the sum of RM98,309.68 (see the official receipts as exhibited in exhs 'TLL 5A' to 'TLL 5F'). The total sums paid by the plaintiff for both companies to the Inland Revenue Department amounted to a hefty RM112,951.20 and the plaintiff now sought to be indemnified by the defendants of that amount. The first defendant affirmed an affidavit-in-reply on 6 June 1994 on behalf of himself and the rest of the defendants (encl 11) and deposed that he and the rest of the defendants did not at any time agree when they entered into the written agreement that they would be responsible for paying the income tax of both the companies for the year of assessment 1992 due and payable in 1992. The first defendant averred further that he and the rest of the defendants gave an assurance that Wato did not have hidden liabilities apart from those known liabilities that existed at or before the date when the written agreement was signed. It was deposed further that the first and the rest of the defendants warranted that all taxes due and payable for the year of assessment 1991 and the years before that have been settled by Wato and that there were no claims or actions in court filed against Wato on the date of the signing of the agreement. In regard to the tax

payable by the Hotel for the year of assessment 1992, it was averred by the plaintiff that he believed that it should be paid by the Hotel in 1992. The defendant deposed further, and this was certainly a crucial factor as can be seen subsequently, that he wanted the lawyer, Encik SK Song ('Song'), who prepared the written agreement for both parties, to be called as a witness in the event the plaintiff wanted to deny the allegations made by the defendant. With that the defendant prayed that the plaintiff's originating summons be dismissed with costs.

Song on his own accord saw it fit to affirm an affidavit on 17 June 1994 (encl 12) and in that affidavit he referred to the affidavit-in-reply of the first defendant (encl 11) and deposed the following tabulated facts :

(1) that it was true that he represented both parties in the written agreement dated 29 October 1991 which has been referred to;

(2) what was agreed by both parties after negotiations in regard to the written agreement was that all the liabilities for Wato and the Hotel inclusive of taxes for the year of assessment 1992 up to and until the date of the agreement to be shouldered by the defendants;

(3) what was agreed upon in para (2) above was incorporated in the written agreement as cll 8(a) and 11 thereof;

(4) at all times from the period of discussions till the time when the written agreement was signed both parties who were signatories to the agreement realised and knew that Wato owned all the shares of the Hotel and that all the liabilities to be borne by the defendants would also include that of the Hotel up to and until the date of the agreement; and lastly

(5) that cl 9(h) of the written agreement which stated that 'the company (referring to Wato) has no subsidiaries' was an inadvertent error that escaped the attention of himself and both the signatories to the written agreement.

Put mildly, the affidavit of Song came as a surprise to the defendants because it clearly sided the plaintiff. This prompted the defendants to apply by way of a summons-in-chambers (encl 16) to request the attendance of Song on the date of the hearing which was scheduled on Friday, 26 August 1994 or on any other date of hearing as fixed by the court for the purpose of cross-examining him in regard to his affidavit that was affirmed on 17 June 1994 (encl 12) on the grounds that, firstly, Song had affirmed an affidavit that went against the terms of the written agreement dated 29 October 1991 which showed that he sided the plaintiff even though it was patently clear that he represented both parties in preparing the written agreement, and secondly, the defendants wanted to cross-examine Song in order to determine his role as solicitors for both parties. The Deputy Registrar of the High Court in due course heard the summons-in-chambers (encl 16) on 3 August 1994 and gave an order in terms of the application (encl 19). Somehow, the hearing did not proceed on 26 August 1994.

Finally, when the case came up for hearing on 21 February 1995, Encik Ho Thian Cheh for the plaintiff drew the court's attention to the defendants' counsel's desire to cross-examine Song. This was appreciated. Song then took the stand. Briefly, he testified that he was the common solicitors for both the plaintiff and the defendants in respect of the written agreement dated 29 October 1991 and it was he who had drafted that agreement. He was shown a letter dated 9 October 1991 by the defendants' counsel, Encik Gan Techiong, and he admitted that it was his letter addressed to the directors of Wato. Though this letter was of no significance, yet it was tendered and marked as exh D1. He was next referred to the written agreement in encl 2 and exhibited as 'TLL 1' especially to p 15 thereof and he agreed that the signatories signed the written agreement in his presence. He also agreed that it was he who prepared the written agreement. He was then referred to his affidavit affirmed on 17 June 1994 (encl 12) and he admitted making it and, arising out of that, he was referred especially to para 3(b) (where it was said that both parties agreed after negotiations that all the liabilities for Wato and the Hotel inclusive of taxes for the year of assessment 1992 up to and until the date of the agreement to be shouldered by the defendants) and he was questioned to the effect that this paragraph was not reflected in the written agreement. In answer he said that he thought that para 3(b) of encl 12 was amply covered by cl 8 paras (a) and (b) and by cl 11 of the written agreement. This was clearly borne out according to him by his affidavit in encl 12 para 3(c) thereof. He agreed that the word 'company' appearing in the written agreement especially at cl 2(a) referred to Wato. He was referred to cl 9(h) of the written agreement which said that the company (referring to Wato) has no subsidiaries and to a question whether he regarded the Hotel to be a subsidiary of Wato, he replied in the affirmative. He denied that the defendants were not English educated and were not conversant in the English language. He cannot remember whether he prepared a supplementary agreement in respect of the same transaction.

Under cross-examination, Song admitted that he was distantly related to the defendants, in the nature of a loose relationship. He admitted that at all material times, the parties to the agreement were fully aware that the Hotel was owned by Wato. He testified that when the defendants sold Wato they were in fact also selling the Hotel. He admitted that at the stage of the negotiations preceding the signing of the agreement he was involved and he knew that the matters forefront in the minds of the parties were the price and the income tax liabilities. He was referred to the Third Schedule at p 19 of the written agreement where the balance sheet of the Hotel as at 31 July 1991 under column 'deduct current liabilities' there was a provision for taxation which showed RM41,862.66 and though he could not remember whether he drew the attention of the parties to this point, yet he testified that it was highlighted as it was an important point for discussion. But he could not remember who had highlighted it. He testified that the provision for taxation in the balance sheet of Wato as at 31 July 1991 under column

'deduct current liabilities' showed the figure RM12,145.53 and he was quick to say that the point was highlighted by the parties in their discussions preceding the signing of the written agreement. He testified that the word 'company' in cl 11 of the written agreement referred to and embraced the subsidiary of Wato, namely, the Hotel and that was why the balance sheets of Wato and the Hotel showed the tax liabilities. He admitted retaining RM120,900 for purposes of tax and the retention sum has since been transferred to Messrs Gan & Lim, the solicitors for the defendants. To his knowledge, the taxes for the year of assessment 1992 of both companies have been paid through the funds of the plaintiff.

Under re-examination, Song admitted that he was not authorised under the written agreement to retain moneys for income tax purposes.

The plaintiff's counsel then applied to question Song through the court and this was allowed. He then testified that the defendants did not object to the retention of RM120,900 for income tax purposes. The defendants' counsel was given the same privilege and upon being questioned Song testified that as a common solicitor he felt that it was his duty to retain the retention sum until the taxes were assessed by the Inland Revenue Department and now he did not hold onto the retention sum as it was handed over to Messrs Gan & Lim, solicitors for the defendants, who had requested for the same on the undertaking not to release them until disposal of the case.

At this juncture, it is appropriate to reproduce cll 8(a) and 11 of the written agreement:

> 8 The vendors (referring to the defendants) hereby jointly and severally undertake with the purchasers (referring to the plaintiff) who for this purpose act for themselves and as trustees for the company and to the intent that the provisions of this clause shall continue to have full force and effect notwithstanding the completion of the said sale in this agreement provided that they will indemnify the company and the purchasers against any deletion or diminution in the value of the assets of the company resulting from:
>
> (a) any claim for payment by the company for whatever property tax, withholding tax, income tax or surtax due and payable prior to the date of this agreement under any Act, Statute or Regulation.
>
> 11 The vendors hereby undertake that on the date of full settlement of the purchase price in the matter aforesaid the vendors shall discharge all the liabilities of the company and there are no claims made or to be made by any person or persons for breach of contract of damages against the company, at all and the vendors agree with the purchasers that in the event of any undisclosed creditors, debts or liabilities of the company being discovered subsequent to the date thereof or if there is any claim in court or otherwise the vendors shall jointly and severally, pay and discharge the same and shall indemnify the company and/or the purchasers against all actions, costs and demands in respect thereof.

> On the date of completion of the sale and purchase herein, the vendors shall ensure that the company's said properties are free of all encumbrances whatsoever.

Encik Ho Thian Cheh argued that the confusion in regard to cl 9(h) of the written agreement where Wato was said to have no subsidiaries has been explained by the common solicitor Song in his affidavit at encl 12 as an inadvertent error which was not traversed by the defendants' in their affidavit-in-reply at encl 11. Under oath, when giving his evidence, Song testified that he regarded the Hotel to be a subsidiary of Wato. Flowing from these, it was argued that if the parties had intended to disregard the tax liability of the Hotel why was the balance sheet of the Hotel annexed and exhibited to the schedule of the written agreement together with the balance sheet of Wato. Indeed it must be and, it is my judgment, that the tax liabilities of both companies were contemplated by the parties and this point was amply demonstrated when Song in his capacity as the common solicitor retained a sum of RM120,900 for that very purpose. It is pertinent to point out that Song was not questioned to bring home the point that there was no necessity for him to hold onto the retention sum; this failure must have been deliberate for that retention sum eventually found its way to the clients' account of the defendants' solicitor. It was put feebly to Song that the written agreement did not incorporate the authority to pay tax for the Hotel. This was certainly not enough to break Song's assertion that the tax liability of the Hotel was also considered as part and parcel of the written agreement.

Though the word 'company' in the written agreement referred to Wato and this point was agreed upon by Song, yet the tenor of his affidavit in encl 12 and his evidence under oath unmistakably point to one thing. It is this — that the defendants sold Wato together with the Hotel to the plaintiff. Thus, when viewed in this angle cl 8(a) of the written agreement would impose a burden unto the defendants to indemnify the plaintiff for income tax due and payable prior to the signing of the written agreement and which was incurred by the plaintiff. The net of liability is thrown wider by the general words employed in cl 11 of the written agreement and that liability on the part of the defendants' would incorporate both hidden and exposed liabilities. The undisclosed debts of Wato and the Hotel under cl 11 of the written agreement must also include the tax liabilities which had been settled by the plaintiff and the defendants must therefore indemnify the plaintiff to that extent. This must be the construction that has to be attached to cl 8(a) and 11 of the written agreement especially when one bears in mind that the word 'company' embraces the Hotel together with Wato as asserted by Song under oath and this point was never challenged by the defendants through their counsel.

The affidavit of the plaintiff and the defendants can be described as self-interested testimonies as compared to the affidavit evidence and the oral testimony of Song. The contemporaneous or near contemporaneous oral evidence of Song particularly the background negotiations between the parties preceding the signing of the written

A agreement especially those parts in regard to the sale of the Hotel together with Wato and the income tax liabilities of the two companies were matters relevant and germane and ought to be considered by the court. The Singapore Court of Appeal held in the case of *The First National Bank of Chicago v Tan Lai Wah* [1981] 2 MLJ 100, inter alia, that where oral self-interested testimony is conflicting on a particular B matter and there is contemporaneous or near contemporaneous documentary evidence relevant to the matter before the court, such evidence should also be given due consideration by the court, particularly if such documents came into existence long before the matter in question became one of dispute between the parties, before it makes a finding on C the matter in issue; in this case regard should be had to the three documents before the court (letters dated 22 April 1974, 8 August 1974 and 10 August 1974). Though the Singapore Court of Appeal in *The First National Bank of Chicago* (supra) relied on three documents as being contemporaneous or near contemporaneous documentary evidence to decide the issue before the court, the principle enunciated in this D case when applied to the contemporaneous or near contemporaneous oral evidence of Song would necessarily, by analogy, be able to thrash out and decide the issue before this court, viz, whether the sale of Wato would include the Hotel and this issue is also tied up with the all pervading issue of the tax liabilities of both these companies.

E By way of summons-in-chambers in encl 16, the defendants applied for cross-examination of Song based on his affidavit in encl 12 and this was effected by way of O 38 r 2(3) of the Rules of the High Court 1980 ('RHC'). The *Supreme Court Practice 1979* Vol 1 at p 591 contains this passage:

F > The court may refuse to act on an affidavit where the deponent cannot be cross-examined (*Shea v Green* 2 TLR 533; and see *The Parisian* 13 PD 16); and if the deponent does not appear for cross-examination where notice to cross-examine has been given, the affidavit cannot be read in his absence without leave.

G For convenience, O 38 r 2(3) of the RHC is reproduced below:

> In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party H order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

Song attended court and was cross-examined by the defendant's counsel. I Unfortunately, Song's oral testimony was not to the taste nor the liking of the defendants. It was a sheer case of bad luck. The defendants' counsel wasted no time and strenuously argued that both Song's affidavit and his oral testimony that run counter to the written agreement ought to be rejected as it contravened ss 91 and 92 of the Evidence Act 1950.

Reliance was placed on a passage appearing in the judgment of Mohamed Azmi FJ, in the case of *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 (FC) especially at p 247 where his Lordship said :

> As far as our law is concerned, the exclusion of oral by documentary evidence, is governed by ss 91 to 99 of the Evidence Act 1950. Section 91 provides that the contents of a document must be proved by the document itself, and s 92 provides that subject to certain provisos, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms. Section 93 further provides that when the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Encik Ho Thian Cheh submitted that it did not lie in the mouth of Encik Gan Techiong to say that Song's oral testimony was inadmissible as it was he who had invited Song into the arena of combat. Song must have been familiar, as a lawyer, with O 38 r 2 (3) of the RHC for if he did not attend court for cross-examination, his affidavit in encl 12 'shall not be used as evidence without the leave of the Court.'

It was argued that the defendants were estopped from saying that the oral testimony of Song should not be accepted by the court as it tended to vary and add to the written agreement entered between the parties because it was the defendants' counsel that applied by way of a summons-in-chambers in encl 16 to cross-examine Song. There is merit to this argument. Since time inmemorial an estoppel has been regarded as part and parcel of the law of evidence but more importantly it has since been viewed as a substantive rule of law (*Canadian and Dominions Sugar Co Ltd v Canadian National (West Indies) Steamships, Ltd* [1947] AC 46 (PC) at p 56). Basically, an estoppel is said to exist when a party to legal proceedings is precluded from alleging or proving that a fact is otherwise than it has been made to appear. Now, had Song given evidence in favour of the defendants the objections under ss 91 and 92 of the Evidence Act 1950 would not be advanced. What did Song actually say in his oral testimony that sparked off vehement objections by the defendants? He adverted to the surrounding circumstances and the factual background that led to the signing of the written agreement between the parties. He said that the sale of Wato included the Hotel. He said that the parties were concerned about the price and the income tax liabilities. That the parties were particularly concerned about the income tax liabilities could be seen by the balance sheets of Wato and the Hotel being annexed in the Third Schedule to the written agreement and the fact that Song retained RM120,900 for tax purposes. On the authority of *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* (supra) what was adverted to by Song in his oral testimony was clearly admissible (his Lordship Mohamed Azmi FJ, said in that case at p 247 para H right hand column: 'As against this, evidence of surrounding circumstances and factual background have always been admissible').

A comparison was made between the words appearing in cl 8(a) of the written agreement especially the words '... income tax ... due and payable prior to the date of this agreement' with the words employed in s 103(1) of the Income Tax Act 1967 particularly the words '... tax payable ... on the service of the notice of assessment ... on the person assessed be due and payable' and it was argued that since the notice of assessment on Wato was dated 20 September 1992 (exh 'TLL 2' of encl 2), and the notice of assessment on the Hotel was dated 17 October 1992 (exh 'TLL 3' of encl 2), the defendants were not liable to pay or to reimburse the plaintiff since the income tax was not due and payable prior to the date of the written agreement which was signed on 29 October 1991. It was the defendants' case that income tax payable after 29 October 1991 should not be shouldered by them. This argument is totally devoid of merit. The assessments for Wato Hotel and the Hotel were meant for taxes incurred in 1991 and payable in 1992. That is the scheme of the Income Tax Act 1967. To construe otherwise would fly in the face of reality and common sense reading of the provisions of the Income Tax Act 1967.

Next, it was argued that though the word 'company' in the written agreement referred to Wato, one must proceed further to lift the corporate veil of Wato. The very act of piercing the corporate veil of Wato would show the existence of the Hotel as a subsidiary of Wato. Song sought to explain that this was so. In *Re A Company* [1985] BCLC 333, the Court of Appeal upheld the lifting of the corporate veil by the judge in granting a Mareva injunction on the ground that there was an element of fraud. *Wallersteiner v Moir* [1974] 1 WLR 991; [1974] 3 All ER 217 is authority for the proposition that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. Back home in Malaysia, in *Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (SC), the then Supreme Court ruled that the court could generally lift the corporate veil in order to do justice particularly where an element of fraud is involved. I am urged to lift the corporate veil of Wato even though no fraud is involved in this case and, accordingly, with the sole objective of achieving justice the piercing of the corporate veil of Wato when made would reveal the existence of the Hotel. If the defendants said that the company specifically referred to Wato and not together with the Hotel, two questions immediately come to the forefront: firstly, why must the tax liability of the Hotel be annexed to the Third Schedule of the written agreement?; secondly, why was the retention money for taxes retained by Song and eventually transferred and held by Messrs Gan & Lim, the solicitors for the defendants?

For the reasons adumbrated above, the prayers sought for in paras (1), (2) and (3) of encl 3 were granted to the plaintiff.

Application allowed.

Reported by PY Lo